(3)

Supreme Court, U.S.
FILED
APR 13 2004
OFFICE OF THE CLERK

No. 03-915

IN THE

Supreme Court of the United States

DEFENDERS OF WILDLIFE ET AL.,
PETITIONERS

v.

WILLIAM T. HOGARTH,
ASSISTANT ADMINISTRATOR FOR FISHERIES,
US NATIONAL MARINE FISHERIES SERVICE, ET AL.,
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

William J. Snape, III
(Attorney of Record)
Defenders of Wildlife
1130 17th Street, NW
Washington, D.C. 20036
202-772-3218

Brian B. O'Neill
Faegre and Benson
2200 Wells Fargo Center
90 S. 7th Street
Minneapolis, MN 55402

Katherine A. Meyer
Meyer and Glitzenstein
1601 Connecticut Ave, NW
Washington, D.C. 20009

Attorneys for Petitioners

REPLY TO RESPONDENTS
IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI

Respondents, William T. Hogarth, et al., federal administrative agencies directed by Congress to implement the U.S. dolphin-safe tuna program, contend that these agencies acted within their "statutory authority in adopting a requirement that fishing vessels, by 30 minutes *after* sundown, complete the backdown procedure for releasing dolphins captured in purse seine fishing nets." Respondents' Question Presented (emphasis added). Even under respondents' narrowed construction of the case, which remarkably does not dispute the "30 minutes *before* sundown" Congressional mandate, Pet. App. 77a at (B)(v), serious constitutional issues are raised by their blatant departure from both the plain language and overall intent of the U.S. Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1413(a)(2)(A)-(B)(v), 1361, as amended. But see 50 C.F.R. 216.24(c)(6)(iii) (Pet. App. 105a).

Respondents rely upon and represent that it "may be appropriate," under 16 U.S.C. § 1413 (a)(2)(C), for them to change a congressional conservation mandate that is part of the same provision within the same statute. Respondents' Brief at 9-10. But Congress "does not, one might say, hide elephants in mouseholes." Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 468 (2001) (upholding prohibition against considering costs in setting air quality standards despite, inter alia, agency authority to make revisions "as may be appropriate" under 42 U.S.C. § 7409(d)(1)). "Appropriate" under any definition means that which is "suitable or compatible" or "fitting." See, e.g., Webster's New Collegiate Dictionary (1981). It defies all reason, and precedent of this Court, that harmful sundown sets on dolphins could be administratively "appropriate" in light of the specific congressional prohibition *against*

sundown sets. 16 U.S.C. § 1413(a)(2)(B)(v).[1] The clearly correct legal reading of this statute necessitates saving the sundown set provision, "rather than to emasculate an entire section, as the Government's interpretation requires." United States v. Menasche, 348 U.S. 528, 539 (1955).

Petitioners urge the Court to consider three fundamental problems with respondents' argument that federal agencies can now unilaterally re-write congressional mandates when they deem it "appropriate":

First, respondents ignore not only the specific congressional mandate at issue, which applies only to U.S. vessels and could not be clearer, 16 U.S.C. § 1413(a)(2)(A)–(B)(v), but also the purposes of the 1997 amendments to the MMPA, Pet. App. 61a – 91a. The two international agreements preceding the 1997 International Dolphin Conservation Program Act (IDCPA), *as well as the IDCPA itself*, expressly committed U.S. vessels to an objective of "progressively reducing dolphin mortality" to a level "approaching zero" and the "goal of eliminating dolphin mortality." See IDCPA, § 2(b)(4), Pet. App. 62a-63a; Declaration of Panama, Pet. App. 152a; La Jolla Agreement, Pet. App. 141a.

More importantly, the statutory mandate to *ensure* that the backdown procedure begin no more than "30 minutes *before sundown*" cannot be overridden by a concomitant authority to make "adjustments to requirements," to technical "fishing practices" "as may be appropriate." See 16 U.S.C. § 1413(a)(2)(B)-(C) (Pet. App. 76a-80a; IDCPA § 303). An examination of the regulations contemplated by 16 U.S.C. § 1413(a)(2)(B) (Pet. App. 77a-78a; IDCPA § 303(a)(2)(B)) – including all twelve of the subsections thereafter listed – demonstrates that "ensuring" no sundown sets by U.S. vessels is quite analogous to

[1] See also 16 U.S.C. § 1374(b)(2)(D) (marine mammal take permits shall include certain mandates and "any other terms or conditions which the Secretary deems *appropriate*") (emphasis added).

"banning" the "use of explosive devices" during fishing operations under 16 U.S.C. § 1413 (a)(2)(B)(vi), rather than, "requiring the use of special equipment" under 16 U.S.C. § 1413 (a)(2)(B)(iv) (emphasis added to term also used in subsection (a)(2)(C)). Put another way, an administrative abrogation of the exact statutory language in 16 U.S.C. § 1413 (a)(2)(B)(v) simply cannot be reconciled with the limited authority granted by 16 U.S.C. § 1413 (a)(2)(C).[2] Congress would not and could not prohibit sundown sets by then affirmatively authorizing such harmful such sets for U.S. vessels through an "adjustments to requirements" section that is much less definitive and specific than the statutory sundown set provision in question. Id.

Second, respondents cannot escape their Article VI and Presentment Clause problems. See, e.g., Respondents' Brief at 11. ("Congress therefore also possesses the authority to grant the agency regulatory authority to *adopt regulations reflecting the terms of any agreement reached.*") (emphasis added). Thus, here, the "contingency" upon which respondents rely – the non-Treaty international agreement – is no more lawful than the President's line-item altering of Congressional will and action in Clinton v. New York, 524 U.S. 417 (1998). The international agreement's conflicting provision on backdown procedure timing, negotiated and adopted for foreign vessels by the State Department, is certainly far different than the contingency of foreign tariffs expressly delegated to the President in Field v. Clark, 143 U.S. 649 (1892). Respondents can point to no authority for the proposition that Congress' intent was to overturn a strict conservation procedure, the backdown procedure described at Respondents' Brief at 5, fn.2, particularly when the "International Dolphin Conservation Program" defined by the statute explicitly

---

[2] Further, three of the impacted stocks of dolphins are "depleted" under the MMPA, triggering increased protection for them. See, e.g., MMPA, 16 U.S.C. §§ 1362, 1413(a)(2)(A).

references two earlier international agreements that had no language at all on sundown sets. Pet. App. 63a (16 U.S.C. § 1362)), 76a (16 U.S.C. § 1413(a)(1)). See also Appendices G and H (Pet. App. 141a -161a).[3]

Third, respondents' violation of the administrative procedural canons, emboldened in S.E.C. v. Chenery, 318 U.S. 80 (1943) and Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983), directly led to the constitutional and statutory issues raised by this petition for a writ of certiorari. Thus, petitioners most certainly *do* dispute "the court of appeals' conclusion that the time for completing the backdown procedure constitutes a 'fishing practice' within the meaning of Section 1413(a)(2)(C)." But see Respondents' Brief at 9. Throughout this litigation, petitioners have regarded the sundown set provision as a "conservation mandate or procedure," not an "adjustment to a technical requirement." Respondents themselves, who have *never* defined "fishing practices" in this regulatory regime, Pet. App. at 92a – 140a, do not deny that effectively lifting the ban on sundown sets is *significantly* more harmful to the three depleted populations of dolphin (and all dolphin populations) than sets completed by the statutorily proscribed 30 minutes *before sundown*. Pet. App. 213a, 225a. Respondents also admit, contrary to the federal government's earlier explanation, that the statutory provision in question was *not* "a drafting error." Compare Pet. App. 93a (Federal Register final rule comment) with Respondents' Brief at 7-9. Once the excuse of congressional mistake is properly discarded, this Court is left with nothing but an unaccountable agency departure from a highly deliberate policy choice by

[3] Similarly, in United States v. Shimer, it was held that a veteran must compensate the federal government agency guarantor under federal law despite the existence of compelling state law on the matter. 367 U.S. 374 (1961).

Congress. Agencies must follow legislative mandates, not create them by administrative fiat.

CONCLUSION

The petition for writ of certiorari should be granted for the compelling and significant reasons so stated.

Respectfully submitted,

William J. Snape, III
Defenders of Wildlife
1130 17th Street, NW
Washington, D.C. 20036
202-682-9400 x118
(Attorney of Record)

Brian B. O'Neill
Faegre and Benson
2200 Wells Fargo Center
90 S. 7th Street
Minneapolis, MN 55402

Katherine A. Meyer
Meyer and Glitztenstein
1601 Connecticut Ave, NW
Washington, D.C. 20009

Attorneys for Petitioners

April 13, 2004